

Labcraft Division of Curtin Matheson Scientific, Inc. and United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC, Petitioner. Case 9-RC-16068

April 15, 1993

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 4 and 5, 1992, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 16 for and 17 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief. Contrary to the hearing officer's recommendation regarding Objection 5, the Board has decided to sustain that objection and orders that the election be set aside and a new election held.¹

Petitioner's Objection 5 alleges that the Employer interfered with employees' free choice in the election by prohibiting the distribution of union literature on August 3, 1992, before an employer meeting. Between 4 and 6 p.m. on the afternoon before the day of the election, the Employer scheduled a speech and reception at a motel. Attendance was mandatory at the speech and optional at a reception to follow.² The employees were informed that they would be paid for the time that they spent at the meeting.

Prounion employee Judy Fryman arrived at the motel with union handbills some time before 4 p.m. The handbills contained questions that the Union urged employees to ask the Employer at the meeting. Fryman gave a handbill to employee Thane Fickle in the parking lot before she entered the motel. She then passed out handbills to an additional six to eight employees in the lobby of the motel, where she was stationed at about 3:55 p.m. when Division Vice President Jeff Jenson and Corporate Vice President Edward McCafrey arrived. Fryman continued to pass out handbills inside the meeting room after 4 p.m., but only to those employees whom she had not reached in the parking lot and the lobby.

At 4:14 p.m., prior to Jenson's starting the meeting, Jenson noticed that Fryman was passing out handbills inside the meeting room and conferred with McCaf-

frey. Both agreed that Jenson would tell Fryman to stop the distribution. Jenson then approached Fryman and instructed her to stop distributing the handbills and to collect those she had already distributed.

By the time she received these instructions, Fryman had distributed almost all of the handbills. After some discussion, she complied with Jenson's order, collecting most of them and tucking them under her purse as the meeting began. When employees asked Fryman why she was collecting the handbills she had given out, she replied: "Because Jeff [Jenson] said I can't pass them out."

The hearing officer concluded that the Employer's conduct did not warrant setting aside the election because it did not impair the Petitioner's ability to communicate with employees or prevent employees from receiving information from both sides so as to enable them to make an informed choice as to representation. According to the hearing officer, the Employer has no obligation to provide the Union with equal access to its employees in time reserved for a captive-audience meeting, and the Employer's conduct did not amount to a prohibition on, or discipline for, asking questions.

Although we agree that there were no other impediments to the free exchange of information during the campaign, we nonetheless find merit in the Petitioner's objection. It is unnecessary for us to decide here whether it is an objectionable ban on distribution for an employer to prohibit handbilling at a nonwork location that the employer has reserved to deliver a captive-audience speech where there is no previously announced rule against such distribution. Here, the Employer went beyond merely halting the distribution of union literature at its meeting; it also ordered that literature previously distributed when no ban was in effect be confiscated by a prounion employee, and made that order so broad as to include handbills that had been distributed outside the confines of the meeting room and before the scheduled meeting time.

An employer cannot fairly rely on the well-established principle that "[w]orking time is for work,"³ when, as here, it requires a prounion employee to collect union literature rightly in the possession of others. Beyond the message on the material she handed out, Fryman's handbilling conveyed to employees her support for the Petitioner and her willingness to advance its position in the representation campaign. By ordering her to collect the handbills, the Employer manifestly required her to repudiate that expression of prounion sentiment or risk a charge of insubordination. In essence, the Employer impermissibly ordered Fryman to carry out the Employer's antiunion instructions, and all of this occurred in the presence of the

¹In view of this disposition, we find it unnecessary to pass on the hearing officer's findings and recommendations concerning Petitioner's Objections 1, 2, 7, and 9.

²The meeting concluded before the Board's 24-hour prohibition on captive-audience meetings went into effect.

³*Peyton Packing Co.*, 49 NLRB 828, 843 (1943), *enfd.* 142 F.2d 1009 (5th Cir. 1944), *cert. denied* 323 U.S. 730 (1944), *quoted in* *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 *fn.* 10 (1944).

other employees.⁴ At the same time, by requiring Fryman to retrieve the union literature from those employees who had accepted it, the Employer singled out those employees for its opprobrium in the presence of their supervisors and fellow employees. Its order reasonably tended to discourage all the employees in the exercise of their right to engage in protected activity.

Fryman was ordered to collect handbills that she had distributed not only in the meeting room, but in the parking lot and motel lobby as well—locations where there is no presumptive justification for an employer ban on union solicitation or distribution.⁵ Because Fryman complied with the Employer's instructions by collecting most of the handbills she had distributed, we infer that at least some of the employees who had been approached outside the meeting room were among

those whose handbills Fryman retrieved and that a significant number of unit employees were approached in the retrieval effort. Employees were also aware that the Employer had prompted the collection. Thus, when employees understandably expressed curiosity over why Fryman was collecting handbills she had given them only minutes earlier, Fryman explained that she had been ordered by the Employer to do so. Even assuming for argument's sake that the Employer could ban distribution in the meeting room, we note that here the Employer's literature-retrieval efforts did not exclude union literature distributed in the motel parking lot and hallways and encompassed literature distributed during nonmeeting time. Thus, in practical effect the Employer discriminatorily promulgated an on-the-spot, unlawfully broad no-distribution rule. See *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 620–622 (1962).

In these circumstances, we find that the Employer has interfered with the laboratory conditions necessary for a fair election. We therefore sustain the Petitioner's Objection 5 and direct a second election.

[Direction of Second Election omitted from publication.]

⁴Member Oviatt views the Employer's order to Fryman to, in a sense, align herself with the Employer's antiunion position to be analogous to requiring employees to assist the Employer in surveillance of others' union activities in violation of Sec. 8(a)(1). See, e.g., *Midland Transportation Co.*, 304 NLRB 4, 8 (1991), *enfd.* in pertinent part 952 F.2d 1323 (8th Cir. 1992).

⁵See generally *Republic Aviation*, *supra* at fn. 3.